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No. 16-784

In the
Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICI CURIAE BRIEF OF BANKRUPTCY LAW PROFESSORS RALPH BRUBAKER, BRUCE A. MARKELL, CHARLES W. MOONEY, JR., AND MARK J. ROE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amici curiae are professors who have devoted their careers to teaching, studying and writing about bankruptcy law. Their scholarship focuses on the text, structure, legislative history, and policy objectives of the Bankruptcy Code, as well as on the practical economic impact of the bankruptcy system. Accordingly, *amici* have a strong interest in the correct interpretation of the Bankruptcy Code and the effective implementation of the public policies bankruptcy law is designed to promote.

The professors filing this brief are nationally and internationally recognized scholars, each of whom has participated as an *amicus* in prior cases involving foundational issues of bankruptcy law. The statutory provision at the center of this case, Bankruptcy Code §546(e), contains a safe harbor that prevents avoidance of a securities "settlement payment" or a transfer in connection with a "securities contract," unless the transfer at issue was an actual-intent fraudulent transfer. That safe-harbor provision was originally enacted in 1982 at the instance of the SEC, to protect the securities settlement and clearing process from what has become known as "systemic risk." Unlike the decision below, however, many courts have mistakenly applied the §546(e) securities safe harbor to protect transactions that pose no threat to the integrity of

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no party or their counsel made any monetary contribution toward the preparation or submission of this brief.

the security settlement and clearance process. As a result, §546(e) has become a tool for considerable mischief with far-ranging ramifications. There is a wide array of securities industry transactions that §546(e) shields from avoidance; the transfer at issue in this case is not one of them. This case presents the Court with an opportunity to resolve the disagreements among the federal courts in a way that faithfully implements the statutory language and advances the sound policy objectives Congress intended.

Ralph Brubaker is the Carl L. Vacketta Professor of Law at the University of Illinois College of Law.[2] His prior *amicus* participation in this Court includes: *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017); *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); and *Marshall v. Marshall*, 547 U.S. 293 (2006). He is the author of a recent leading commentary on the statutory provision at issue in this case. Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 Bkrtcy. L. Ltr. No. 7, p. 1 (July 2017), available at *http://blogs.harvard.edu/bankruptctroundable/2017/09/05/understanding-the-scope-of-the-§-546e-securities-safe-harbor-through-the-concept-of-the-transfer-sought-to-be-avoided/*.

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Mark J. Roe is the David Berg Professor of Law at Harvard Law School, where he teaches and writes on bankruptcy, corporate law, financial markets, and financial institutions. He recently participated as an *amicus* in this Court in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017). He discusses the issue before the Court in this case in Mark J. Roe & Frederick Tung, Bankruptcy and Corporate Reorganization: Legal and Financial Materials 590-92 (4th ed. 2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

A key step in discerning the correct answer to a legal issue is asking the right questions. So, too, a key step in reaching a sound conclusion is employing the proper analysis. In this case, those keys can be found in understanding that the "transfer" is the textual analytical unit defining what the Bankruptcy Code authorizes to be avoided and for which §546(e) creates a safe harbor from avoidance.

In the decision below, the Seventh Circuit correctly perceived this basic point: "Chapter 5 [of the Code] creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin. It makes sense to understand the safe harbor as applying to the transfers that are eligible for avoidance in the first place." Pet. App. 8. The "transfer" the trustee seeks to avoid is the unit of analysis for determining whether the §546(e) safe harbor shields that "transfer" from avoidance.

This analytical model is a familiar one in the law. Consider, for example, the various exceptions to the hearsay rule. Only if proffered evidence were hearsay in the first place would there be any reason to decide whether it fits within an exception. In short, exceptions apply only to matters covered by the rule.

Another analogy drawn from familiar legal principles illuminates the critical importance of identifying the correct unit of analysis. Consider the application of various categories of evidentiary privilege (*e.g.*, attorney-client, physician-patient,

clergy-congregant). Because the core analytical unit is the "communication," it is not enough simply to know the identities of the speaker and listener. Since not every communication by clients, patients, or congregants to their lawyers, doctors or religious leaders is privileged, proper analysis must focus first on whether the particular "communication" satisfies the criteria for protection.

In the context of the §546(e) safe harbor, merely identifying a securities market intermediary as a participant does not resolve the dispositive question whether a "transfer" is (or is not) protected from avoidance. The correct analytical path for this case is simple and direct. The Code authorizes certain "transfers" to be avoided. And the Code creates safe harbors that protect specified "transfers" from avoidance. Section 546(e) is one of those safe harbors. It prevents avoidance of a "transfer" that is a securities "settlement payment" or that is made in connection with a "securities contract."[3]

By its terms, §546(e) applies if the "transfer" sought to be avoided was allegedly "made by or to (or for the benefit of)" a protected securities market intermediary, such as a stockbroker or a financial institution. Accordingly, §546(e) shields a "transfer" from avoidance only if (1) that transfer was "made

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[3] The applicability of the statutory terms "settlement payment" and "securities contract" is not at issue in this case. There is, however, considerable disagreement in the lower courts regarding whether particular challenged transfers are within the scope of these broadly defined, yet intractably vague, terms. This case presents no occasion for the Court to resolve that interpretive difficulty.

by" a debtor-transferor who was a qualifying intermediary, "or" (2) a party with potential liability—because the challenged transfer was allegedly made "to or for the benefit of" that party—was a protected intermediary.

That construction conforms to the statutory language and fits precisely within the Code's overall structure of avoidance liability and safe harbors. It also is fully consistent with the relevant legislative history. And it implements Congress' policy objectives in a rational, effective way.

The correctness of this approach is further reinforced by assessing the deleterious ramifications of decisions that have construed §546(e) in the way petitioner urges. Under the statutory interpretation offered by petitioner and its supporting *amici*, transfers can be inoculated from avoidance (*e.g.*, as a preferential or constructively fraudulent transfer) simply by inserting a qualified securities market intermediary as a conduit in the transactional chain. In that way, transfers that deplete the debtor's estate—transfers that should be avoided under the terms of the Code for the benefit of the debtor's unpaid creditors—are nonetheless immunized from the trustee's authorized reach. That mistaken interpretation, essentially a roadmap for laundering otherwise avoidable transfers through a financial institution acting as escrow or disbursing agent, is directly contrary to the system Congress enacted. In rejecting that approach, the Seventh Circuit correctly perceived the flaws in petitioner's proposed interpretation. The judgment below should be affirmed.

ARGUMENT

THE KEY TO UNDERSTANDING THE CORRECT SCOPE OF THE §546(e) SECURITIES SAFE HARBOR IS THROUGH THE CONCEPT OF THE "TRANSFER" THAT THE TRUSTEE SEEKS TO AVOID.

Section 546(e) of the Bankruptcy Code, 11 U.S.C. §546(e), creates an exception to a trustee's power to avoid and to recover for the benefit of creditors certain pre-bankruptcy transfers of property made by the debtor.

Code §546(e) (emphasis added), in relevant part, provides as follows:

> (e) Notwithstanding sections 544 [strong-arm and state-law avoidance powers], 545 [avoidance of statutory liens], 547 [preferential transfers], 548(a)(1)(B), and 548(b) [constructively fraudulent transfers] of this title, *the trustee may not avoid a transfer* that is a . . . settlement payment, as defined in section 101 or 741 of this title, *made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, *or* that is *a transfer made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7) . . . that is made before

> the commencement of the case, except under section 548(a)(1)(A) [actual-intent fraudulent transfers] of this title.

The correct resolution of this case requires an accurate understanding of (1) the concept of a "transfer" as the fundamental transactional unit in the Bankruptcy Code's avoiding-power provisions and (2) the relationship between the concept of an avoidable "transfer" and the inextricably interrelated concepts of who that "transfer" is "made by or to (or for the benefit of)."

A. The Fundamental Transactional Unit in the Bankruptcy Code's Avoidance Provisions is a "Transfer."

The various avoiding-power provisions of the Code authorize a bankruptcy trustee to "avoid any *transfer* of an interest of the debtor in property" meeting defined criteria.[4] Section 101(54)(D) defines "transfer" broadly to mean "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property." That definition, however, does *not* specify the transactional unit that comprises the "transfer" the trustee can "avoid," particularly when the "transfer" is effectuated via multiple steps involving multiple entities. But the structure of the Code's avoiding-power provisions makes clear that, for analytical purposes, a "transfer" made "by" the debtor "to" a "transferee" is the fundamental and

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[4] 11 U.S.C. §§544(b)(1) (giving trustee powers of individual creditors to avoid transfers under state law, *e.g.*, using state fraudulent transfer statutes), 547(b) (preferential transfers), 548(a)(1) (fraudulent transfers) (emphasis added). Some of the other avoiding powers alter the operative language slightly, but nonetheless still operate to avoid a "transfer" of property. *See, e.g.*, 11 U.S.C. §§544(a) (so-called strong-arm power to "avoid any *transfer* of property of the debtor"), 549(a)(1) (power to "avoid a *transfer* of property of the [bankruptcy] estate that occurs after the commencement of the case") (emphasis added). The power to avoid statutory liens is phrased in terms of "avoid[ing] the *fixing* of a statutory lien on property of the debtor." 11 U.S.C. §545 (emphasis added). Section 101(37) defines a "lien" as a "charge against or interest in property," and §101(54)(A) defines a "transfer" to include "the creation of a lien." The "fixing" of a statutory lien, therefore, is synonymous with "transfer" of a property interest.

pervasive transactional unit. Thus, the statutorily specified criteria regarding avoidability (or not, as in the case of the §546(e) securities safe harbor) are applied to that "transfer."

1. The Code's principal avoiding powers state that the "transfer" that can be avoided is a transfer "*of an interest of the debtor in property.*" *See* n.4, *supra*, and accompanying text. As this Court recognized in *Union Bank v. Wolas*, 502 U.S. 151, 152 (1991) (emphasis added) (citations omitted), this statutory language is simply a more elaborate, comprehensive expression that, for example, "Section 547(b) [the preferential transfer provision] of the Bankruptcy Code authorizes a trustee to avoid certain property transfers *made by a debtor* within 90 days before bankruptcy." *See also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994) (emphasis added) ("The constructive fraud provision at issue in this case [now Code §548(a)(1)(B)] applies to transfers *by* insolvent *debtors*").

That the Code's avoidance provisions operate on transfers made by a debtor is also explicitly acknowledged in the statutory criteria for avoidance of a transfer. For example, actual-intent fraudulent transfers are avoidable "if *the debtor* voluntarily or involuntarily *made such transfer* . . . with actual intent to hinder, delay, or defraud." 11 U.S.C. §548(a)(1)(A) (emphasis added). *See also* 11 U.S.C. §548(a)(1)(B)(ii)(IV) (emphasis added) (constructively fraudulent transfer avoidable "if *the debtor*, voluntarily or involuntarily, *made such transfer* to or for the benefit of an insider"). And the state-law avoidance power most commonly invoked via §544(b)

(including the case at bar) expressly applies only to "[a] transfer made . . . by a debtor."[5]

2. That the Code's avoiding-power provisions, by their terms, authorize avoidance of various "transfers" made "by" a debtor (as transferor) is straightforward and uncontroversial. The correlative concept embedded both in the structure of the statutory avoidance provisions and in the concept of a "transfer" as the fundamental transactional unit is, of course, that the avoidable "transfer" is one made "to" a "transferee." *See Rupp v. Markgraf*, 95 F.3d 936, 942 (10th Cir. 1996) (emphasis added) (citations

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[5] This is the operative language of states' enactment of the Uniform Fraudulent Transfer Act (UFTA) (the state law avoidance power at issue in this case) and the 2014 Uniform Voidable Transactions Act (UVTA). UFTA §§4(a), 5(a), 7A, pt. II U.L.A. 58, 129 (2006); UVTA §§4(a), 5(a), 7A, pt. II U.L.A. 20, 29 (Supp. 2017).

The same was true under the explicit statutory language of the predecessor avoiding-power provisions of the Bankruptcy Act of 1898. *See* 1898 Act §60a(1), reprinted in 3, pt. 2 Collier on Bankruptcy 731 (James Wm. Moore et al. eds., 14th ed. 1978) [hereinafter Collier (14th ed.)] (predecessor to Code §547 preference provision, stating that "[a] preference is a transfer, as defined in this Act ... made ... by [the] debtor" meeting specified criteria); 1898 Act §67d(2)-(3), reprinted in 4 Collier (14th ed.) at 5-6 (predecessor to Code §548 fraudulent transfer provision, applicable to "[e]very transfer made ... by a debtor" meeting specified criteria); 1898 Act §70e(1), reprinted in 4A Collier (14th ed.) at 5 (predecessor to Code §544(b)(1), applicable to "[a] transfer made ... by a debtor" voidable "under any Federal or State law applicable thereto"). The 1898 Act defined "transfer" broadly, in a fashion similar to the Code definition, as "every ... different mode, direct or indirect, of disposing of or of parting with property or with an interest therein." 1898 Act §1(30), reprinted in 1 Collier (14th ed.) at 44.2.

omitted) ("A transfer that may be avoided under the Bankruptcy Code takes place from the debtor *to* some entity . . . a transferee").

Identifying that "transferee" and the attendant circumstances surrounding the "transfer" made "by" the debtor "to" that "transferee" is critical in determining whether that "transfer" is avoidable. For example, "§547 allows a trustee to avoid a preferential *transfer* of assets by a debtor-transferor *to a creditor-transferee* if certain conditions are met." *In re Ogden*, 314 F.3d 1190, 1196 (10th Cir. 2002) (emphasis added). *See* 11 U.S.C. §547(b)(1) (authorizing avoidance of a preferential transfer "to ... a creditor"). And various §547(c) defenses to avoidance, such as the ordinary course of business defense of 11 U.S.C. §547(c)(2), also turn on identifying the "transferee" of that challenged "transfer." The same is true of the good-faith for-value defense for the "transferee" of a fraudulent "transfer." 11 U.S.C. §548(c).

3. If a transfer is avoided under any of the Code's avoidance provisions, the trustee "may recover ... the property transferred, or, if the court so orders, the value of such property from the initial transferee of such transfer *or* the entity *for whose benefit* such transfer was *made.*" 11 U.S.C. §550(a)(1) (emphasis added). The latter concept of beneficiary liability is also critical to understanding the meaning of the determinative "transfer made by or to (or for the benefit of)" scope language of §546(e).

Transfer "for the benefit of" liability is a very familiar idea in the law of avoidable transfers, as it has long been (and still is) embedded in the statutory cri-

teria for avoidance of a preferential transfer. Thus, Code §547(b)(1) provides that a "transfer" by a debtor can be an avoidable preferential transfer if it was made "to *or for the benefit of* a creditor." 11 U.S.C. §547(b)(1) (emphasis added).[6] Likewise, the Code's fraudulent transfer provision repeatedly invokes that same concept in referring to an avoidable "transfer to *or for the benefit of* an insider." 11 U.S.C. §548(a)(1) (emphasis added).

The Fourth Circuit succinctly explained the established meaning of transfer "for the benefit of" liability:

> The traditional examples of the "entity for whose benefit such transfer was made" are a debtor of the transferee or the guarantor of a debt owed by the bankrupt party to the transferee. In both cases, the *transfer* of an asset from the bankrupt party *to the transferee* extinguishes the liability of "the entity for whose benefit such transfer was made." Thus, we have described that entity as "'someone who receives the benefit but not the money.'"

In re Meredith, 527 F.3d 372, 375 (4th Cir. 2008) (emphasis added) (citations omitted) (quoting *In re Columbia Data Prods., Inc.*, 892 F.2d 26, 49 (4th Cir.

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[6] The predecessor provision in the 1898 Act also provided that "a transfer ... of any of the property of a debtor ... made ... by such debtor" could be avoided if made "to *or for the benefit of* a creditor" preferred thereby. 1898 Act §60a(1) (emphasis added), reprinted in 3, pt. 2 Collier (14th ed.) at 731.

1989); *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 895 (7th Cir. 1988)).

4. Section 546(e) creates a safe harbor precluding avoidance of particular "transfers" and, in doing so, uses precisely the same terminology employed in the Code provisions it expressly references (which authorize avoidance of "transfers" made "by" a debtor "to" a transferee "or for the benefit of" a non-transferee). The symmetric consistency of the statutory language fits comfortably within the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) (citation omitted).

The most natural reading of §546(e) is therefore clear: (1) if the challenged "transfer" allegedly (a) was made "by" a debtor-transferor who is a specified securities intermediary, "or" (b) was made "to" a "transferee" ("or for the benefit of" a non-transferee) who is a protected securities intermediary, and (2) that "transfer" was a settlement payment or was made in connection with a securities contract, then §546(e) provides a complete defense to avoidance of that challenged "transfer." *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (citation omitted).

Moreover, that the applicability of §546(e) can only be determined by reference to the actual "transfer" at issue in a particular case—*i.e.*, the "transfer" sought to be avoided—is clearly revealed

by the fact that §546(e) is a *safe harbor exemption* from the trustee's avoiding powers. Thus, §546(e) is introduced by a dependent "notwithstanding" clause explicitly cross-referencing those statutory avoiding powers. As this Court explained in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012): "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." Accordingly, the §546(e) safe harbor excepts from avoidance "transfers" that might otherwise be challenged under the avoiding-power provisions referenced in its "notwithstanding" clause.

There is no good reason to think that "transfer" as used in the §546(e) safe harbor should be construed to refer to something other than the actual "transfer" sought to be avoided under one of the statutory avoiding powers explicitly referenced in §546(e). If so construed, the safe harbor would function in a nonsensical fashion (*i.e.*, a safe harbor exemption shielding from avoidance a "transfer" that is *not* being challenged). Indeed, petitioner acknowledged to the Seventh Circuit that the trustee in this case is "seeking avoidance and recovery" of "transfers" made "by" debtor Valley View Downs "to" petitioner Merit Management as "initial transferee," neither of whom were qualifying §546(e)

intermediaries.[7] Yet petitioner simultaneously (and incongruously) argues that those same "transfers" are shielded from avoidance under §546(e) because they must be considered to have been made "by" and "to" the two conduit financial-institution intermediaries through which those "transfers" were effectuated.

The term "transfer" in §546(e) shields from avoidance an actual "transfer" that the estate representative seeks to avoid under one of the avoiding powers explicitly referenced in §546(e). Consequently, the associated phrase "made by or to (or for the benefit of)" should also carry the "transfer"-correlative meanings that those terms carry in the avoiding-power provisions. The Code authorizes avoidance of a "transfer" made "by" a debtor "to" a "transferee" if specified conditions regarding that transfer are met. If that transfer is avoided, the transferee "to" whom the transfer was made has liability, and if that transfer was made "for the benefit of" a non-transferee, that benefitted entity is also liable. By its express terms, therefore, §546(e) shields a challenged "transfer" from avoidance only if (1) that transfer was "made by" a debtor-transferor who was a qualifying securities intermediary, "or" (2) a party with potential liability—because the challenged transfer allegedly was made "to or for the

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[7] *See* Brief of Defendant-Appellee at 5, *FTI Consulting, Inc. v. Merit Mgmt. Grp.*, 830 F.3d 690 (7th Cir. 2016) (No. 15-3388), 2016 WL 614281, at *5 ("Trustee filed suit against Merit Management ... *seeking avoidance and recovery of transfers [debtor] Valley View Downs made to [petitioner] Merit Management* in the amount of $16,503,850" (emphasis added)).

benefit of" that party—was a protected securities intermediary.

In this case, as petitioner has acknowledged, the trustee seeks "avoidance and recovery" of a "transfer" made "by" debtor Valley View Downs "to" petitioner Merit Management as "transferee" (*see* n.7, *supra*) and neither debtor-transferor nor petitioner-transferee were protected §546(e) intermediaries.[8] By the express terms of §546(e), therefore, the securities safe harbor has no applicability to the "transfer" sought to be avoided in this case.

B. Legislative History Confirms Congress' Determination that the "Transfer" Sought to be Avoided is the Transactional Unit to which the §546(e) Safe Harbor is Directed.

1. The predecessor to what is now §546(e) was enacted in 1978 as §764(c) of the new Bankruptcy Code and, as many courts have recognized, that safe harbor provision "was a response to the [1975] decision in *Seligson v. New York Produce Exchange*." *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 n.4 (10th Cir. 1990). *See* S. Rep. No. 95-989, at 106 (1978) (citing *Seligson v. N.Y. Produce Exch.*, 394 F. Supp. 125 (S.D.N.Y. 1975)), reprinted in 1978 U.S.C.C.A.N. 5787, 5892. In *Seligson*, the trustee for a bankrupt commodities brokerage firm sought to avoid, as fraudulent transfers, margin payments the

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[8] Moreover, neither petitioner nor respondent contends that the challenged "transfer" was made "for the benefit of" the two conduit financial institution intermediaries through which that transfer was effectuated.

debtor made to the clearing association for the commodities exchange on which the debtor executed commodities trades. Whether the margin payments were avoidable turned on "whether the defendant sought to be held liable [the clearing association] is indeed a *transferee* of the fraudulent transfer," and "[t]he Association's sole contention in this regard is that it was a mere 'conduit' for the transmittal of margins." 394 F. Supp. at 127-28, 135 (emphasis added).

Seligson held that genuine issues of material fact precluded summary judgment on the question whether the challenged margin payments were made *to* the clearing association as *transferee* or, alternatively, whether the clearing association could be disregarded as a "mere conduit" that can have no avoidance liability. *Id.* at 136. Accordingly, the court permitted the trustee's suit against the clearing association (alleging that the margin payments were made "to" the clearing association as "transferee") to proceed to trial. *Id.*

Uncertainty about the application of the "mere conduit" concept and the consequent prospect for avoidance liability as a "transferee" of margin payments prompted enactment of the initial avoidance safe harbor. That statutory safe harbor provided that "the trustee may *not* avoid a *transfer* that is a margin payment *to* . . . a commodity broker or forward contract merchant." Pub. L. No. 95-598, 92 Stat. 2549, 2619 (1978) (emphasis added) (enacting 11 U.S.C. §764(c)) (superseded in 1982 by 11 U.S.C. §546(e)).

This provision gave commodity brokers and forward contract merchants (FCMs) the same protection against avoidance liability (for margin payments they received) that is available to "mere conduits," who are not liable as "transferees" of an avoidable transfer. Moreover, this provision guaranteed that protection automatically, without the uncertainty, expense, and prospective liability associated with litigating "mere conduit" status (as illustrated by the *Seligson* case).

The rationale offered in the Senate Report confirms that the initial safe harbor was designed to give commodity brokers and FCMs automatic "mere conduit" protection against any avoidance liability for receipt of a commodity margin payment: "It would be unfair to permit recovery from an innocent commodity broker since such brokers are, for the most part, simply conduits for margin payments." S. Rep. No. 95-989, at 106, reprinted in 1978 U.S.C.C.A.N. at 5892. *See* Brubaker, *supra*, at 12 (quoting CFTC official's contemporaneous explanation). Indeed, the fees such brokers charge are miniscule relative to the dollar amount of the payments at issue, so one can fully appreciate Congress' desire to shield such intermediaries from avoidance liability for those payments, particularly given the importance of such market intermediaries to the proper functioning of the commodities markets.

The concern *Seligson* created and that the original safe harbor addressed was the prospect of avoidance liability as a "transferee" for specified market intermediaries. In creating a safe harbor

from liability for those intermediaries, the statute utilized the pervasive "transfer" concept as the analytical transaction unit for determining the avoidability (or not) of commodity margin payments—preventing avoidance if the "transfer" at issue was a commodity margin payment allegedly made "to" a commodity broker or FCM as "transferee." And, of course, if the trustee conceded that the margin payment was not made "to" a protected commodity broker or FCM as "transferee" (because the commodity broker or forward contract merchant was a "mere conduit," as the defendant argued in *Seligson*), then the safe harbor obviously would not apply because "true conduits . . . may not be subject to an avoidance recovery at all, thus rendering a [safe harbor] exception unnecessary." *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 676-77 n.31 (D.R.I. 1998) (citation omitted).

2. The original 1978 safe harbor also confirmed that the "transfer" sought to be avoided (and, thus, protected by the safe harbor) is *always* a transfer allegedly *made "by" the debtor*. As enacted in 1978, §103(d) provided as follows: "Subchapter IV of chapter 7 of this title [entitled Commodity Broker Liquidation] applies only in a case under such chapter concerning a commodity broker [as debtor] *except with respect to section 746(c)* [sic[9]] which applies to margin payments *made by any debtor* to a commodity broker or forward contract merchant."

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[9] "The original reference in section 103(d) to 'section 746(c)' was a typographical error; the reference should have been to 'section 764(c).'" H.R. Rep. No. 97-420, at 3, reprinted in 1982 U.S.C.C.A.N. 583, 585.

Pub. L. No. 95-598, 92 Stat. at 2555 (emphasis added) (enacting 11 U.S.C. §103(d)) (amended in 1982, in conjunction with the enactment of 11 U.S.C. §546(e), to repeal the "except" clause). That "except" clause was necessary for the 1978 safe harbor to have full effect in protecting the specified market intermediaries from all avoidance liability for margin payments they received.

As this Court has recognized, the Code's avoidance provisions "authorize[] a trustee to avoid certain property *transfers made by a debtor*." *Union Bank v. Wolas*, 502 U.S. 151, 152 (1991) (emphasis added). If the §764(c) safe harbor applied only in commodity broker liquidation cases, it would shield only margin payments made "by" commodity brokers (who subsequently file bankruptcy). But a major category of potential avoidance liability that the safe harbor sought to eliminate was "where the bankrupt is ... a customer of an FCM" or commodity broker who received the customer's prebankruptcy commodity margin payments. Frederick L. White, *The Commodity-Related Provisions of the Bankruptcy Act of 1978*, 34 Rec. Ass'n B. City N.Y. 262, 275 n.13 (1979). To protect transfers "made *by* a debtor" who was *not* a commodity broker, therefore, the safe harbor had to apply generally to commodity "margin payments *made by any debtor* to a commodity broker or forward contract merchant." Pub. L. No. 95-598, 92 Stat. at 2555 (emphasis added) (enacting 11 U.S.C. §103(d)) (amended in 1982, with the enactment of 11 U.S.C. §546(e), to repeal the "except" clause).

That particular statutory provision was rendered unnecessary by the 1982 amendment that moved the

safe harbor into the Chapter 5 provisions of general applicability to all bankruptcy cases. *See* Pub. L. No. 97-222, §2, 96 Stat. 235, 235 (1982) (repealing the "except" clause of §103(d)). Its continuing relevance flows from its clear confirmation that the avoidance safe harbor, from its very inception, operated on the same pervasive transactional unit as do all of the Code's avoidance provisions: a "transfer" made "by" a debtor as transferor "to" a "transferee." *See* 124 Cong. Rec. 34,018 (1978) (statement of Sen. DeConcini and Sen. Mathias) ("the intent of section 764 ... is to provide that margin payments ... previously *made by a bankrupt* to a commodity broker [or] forward contract merchant ... are nonavoidable transfers by the bankrupt's trustee" (emphasis added)).

3. In 1982, at the urging and with the support of the SEC, Congress expanded the avoidance safe harbor beyond the commodities markets, to protect specified securities intermediaries from avoidance liability for any "margin payment" or "settlement payment" they received, in a newly enacted §546(d) (now §546(e)) that replaced former §764(c). Pub. L. No. 97-222, §4, 96 Stat. at 236 (enacting §546(d)); *id.* §17(c), 96 Stat. at 240 (repealing §764(c)). This expanded safe harbor also broadened the scope of non-avoidable "transfers" to include not only those allegedly made "to" a protected commodities or securities intermediary as "transferee," but also any such "transfer" allegedly made "by" a specified intermediary who has filed bankruptcy. *Id.* §4, 96 Stat. at 236 (enacting §546(d)).

With respect to that latter expansion of the safe harbor, Congress understood that it would create the

potential for unacceptable "systemic risk" if a trustee could allege that any and all margin and settlement payments passing through the hands of a bankrupt commodity or securities firm were "transfers" made "by" the debtor firm, and thus potentially avoidable. To eliminate that risk, additional protection was "necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibl[y] threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1, reprinted in 1982 U.S.C.C.A.N. at 583. As the House Report explained, "[t]he Bankruptcy Code now expressly provides certain protections to the commodities market to protect against such a 'ripple effect.'... [F]or example, [Code §764(c)] prevents a trustee in bankruptcy from avoiding or setting aside ... margin payments made *to* a commodity broker." *Id.* (emphasis added) (citation omitted). The 1982 amendments, though, "*broaden* the commodities market protections" to also protect payments made *by* a bankrupt commodity broker "and expressly extend similar protections to the securities market." *Id.* at 2 (emphasis added).

No such "ripple effect" systemic risk is implicated when *neither* the debtor (whose trustee seeks to avoid and recover the "transfer" at issue made "by" the debtor) *nor* the defendant (from whom recovery is sought as alleged transferee "to" whom the "transfer" was made) is a protected market intermediary. Not coincidentally, therefore, the statutory language Congress chose in codifying the safe harbor, by restricting its effect to a "transfer" allegedly "made by or to" a qualifying market intermediary, makes

the safe harbor entirely inapplicable to such a "transfer."[10]

4. The 2006 amendment, which remains current and governs this case, provides further protection to a qualifying intermediary against avoidance liability in connection with a margin payment, settlement payment or securities contract transfer. Congress achieved this objective by amending the "transfer" made "by or to" scope provision of §546(e) to also include the familiar concept of transfer "for the benefit of" avoidance liability. Pub. L. No. 109-390, §5(b)(1)(A), 120 Stat. 2692, 2697 (2006) (amending §546(e)). Without this amendment, it is possible that even a "mere conduit" (who can have no liability for a transfer "to" the conduit as "transferee") nonetheless may have contingent guaranty liability in connection with the transfer (*e.g.*, by virtue of the system of guaranties involved in the securities settlement and clearing process), such that the conduit could face "for the benefit of" liability exposure in connection with the challenged "transfer."[11] In protecting qualifying intermediaries from such beneficiary liability, Congress employed "transfer" made "to or for the benefit of" language that replicated statutory text in the Code's existing avoidance provisions (*see*

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[10] Petitioner's suggestion that the Court should simply ignore the 1982 legislative history regarding Congress' stated purpose in expanding the determinative scope phrase (to include any transfer made "by or to" a qualifying intermediary) is an implicit acknowledgement that petitioner's interpretation would give the securities safe harbor an immensely more expansive sweep than Congress intended.

[11] *See* Brubaker, *supra*, at 14 & nn.101, 102.

11 U.S.C. §§547(b)(1), 548(a)(1)) and even an existing avoidance safe harbor (*see* 11 U.S.C. §926(b) (enacted in 1988, significantly, well *before* the 1996 *Munford* and *Healthco* decisions discussed *infra*, p.31)).[12]

Viewing the Code's avoidance provisions as a whole, the "for the benefit of" language (added to §546(e) in 2006) refers to the firmly established concept of transfer "for the benefit of" avoidance liability. And Congress' addition of that "transfer" liability language reinforces the natural reading of §546(e)'s pre-existing "transfer made by or to" language as transferor and transferee references, in accordance with the canon of *noscitur a sociis* ("it is known by its associates"). *See, e.g., Deal v. United States*, 508 U.S. 129, 132 (1993) ("fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation but must be drawn from the context in which it is used"); *see also Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 409 (2011); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

There is ultimately only one plausible explanation for the 2006 amendment to the §546(e)

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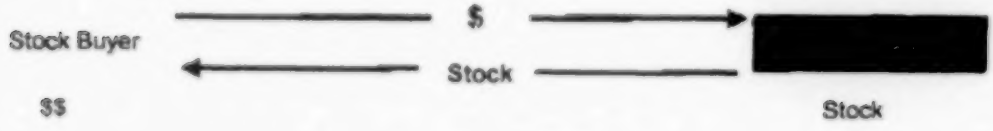
[12] The conjectural argument of petitioner and its supporting *amici* that attributes a contrary, highly idiosyncratic meaning to this "for the benefit of" language, based on the assumption that Congress secretly intended to overrule *Munford* and *Healthco*, ignores the long-established meaning of such transfer "for the benefit of" language, which has been expressly codified in bankruptcy avoidance law since the Bankruptcy Act of 1867. *See* Brubaker, *supra*, at 8, 14-15; Bankruptcy Act of 1867, ch. 176, §35, 14 Stat. 517, 534, reprinted as cumulatively amended in 10, pt. 2 Collier (14th ed.) at 1768.

safe harbor: that amendment protects qualifying intermediaries from "for the benefit of" avoidance liability in connection with a challenged "transfer" that is a margin payment, settlement payment or securities contract transfer, consistent with the accepted meaning of the phrase "for the benefit of" throughout the Code's avoidance provisions.

C. Congress' Intended Scope for the §546(e) Securities Safe Harbor

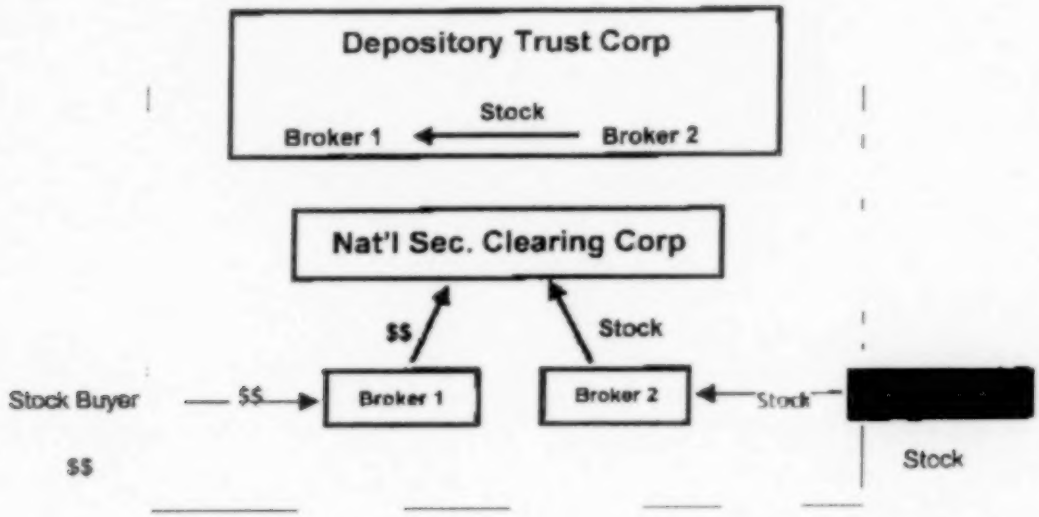
To understand why Congress enacted the §546(e) securities safe harbor and the scope thereof, as revealed by the statutory text and as confirmed by legislative history, it is helpful to consider a typical transaction involving a purchase and sale of stock, effectuated through the securities settlement and clearing system.

When a buyer purchases stock from a seller, the buyer transfers money to the seller, and the seller transfers the stock to the buyer.



These transactions do not typically occur face-to-face; the buyer and seller transact through the securities settlement and clearing system. The buyer sends cash to a securities broker; the seller moves the stock from its broker to the buyer's broker. These transactions between the buyer's and the seller's brokers are cleared by specialized institutions, typi-

cally the National Securities Clearing Corporation and the Depository Trust Corporation.[13]



The brokers who are the conduits for the securities and the cash are not highly compensated for their work, in terms of fees as a percentage of the value of the stock being purchased and sold. Congress' judgment was that the securities settlement and clearing system is a critical component of American financial infrastructure that should not be undermined. Thus, intermediaries who move securities and money to effectuate the purchase-and-sale transaction should not face any exposure for potential avoidable-transfer liability.

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[13] The graphical presentation in the text is a simplified portrayal of the mechanisms by which stock and money are exchanged between Stock Buyer and Stock Seller. For more detailed information about the settlement and clearing process, see Depository Trust and Clearing Corporation, *Understanding the Settlement Process*, http://www.dtcc.com/understanding-settlement/index.html (last visited Sept. 13, 2017).

One of Congess' concerns, phrased in terms of "ripple effect" systemic risk in the 1982 legislative history, is that a bankruptcy filing by one of the conduit intermediaries (*e.g.*, Broker 1) could subject *all* settlement payments passing through the hands of Broker 1 during the period preceding the bankruptcy filing to potential challenge as avoidable "transfers" made "by" Broker 1. And since many of those payments would have also passed through the hands of other market intermediaries, suits to avoid Broker 1's settlement payments could target other intermediaries for massive liability, posing the risk of "the insolvency of one ... security firm ... spreading to other firms and possibly threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1, reprinted in 1982 U.S.C.C.A.N. at 583. The §546(e) securities safe harbor prevents Broker 1's bankruptcy trustee from pursuing avoidance actions based on such an allegation.

Congress' other closely-related concern, highlighted by the *Seligson* case, is that a bankruptcy filing by any of the entities involved in the purchase-and-sale transaction (*e.g.*, Stock Buyer) could subject a conduit intermediary (*e.g.*, Broker 2) to avoidable-transfer liability exposure. If Stock Buyer's bankruptcy trustee sues Broker 2 alleging that Stock Buyer made an avoidable "transfer *to*" Broker 2 as "transferee," the §546(e) securities safe harbor ensures that Broker 2 can obtain dismissal of the trustee's claim *without* having to litigate the issue of

"mere conduit" versus "transferee."[14] And after the 2006 amendment to §546(e), Broker 2 has the same protection against an allegation that Stock Buyer made an avoidable transfer "for the benefit of" Broker 2.

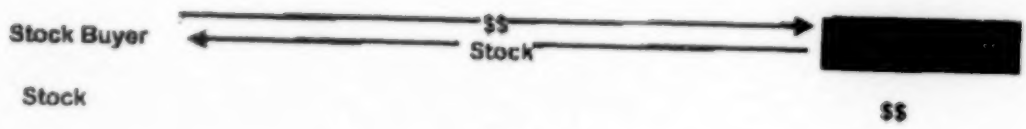
In contrast to those cases within the intended scope of the §546(e) securities safe harbor, consider a suit by Stock Buyer's trustee alleging that Stock

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[14] Petitioner and its *amici* make repeated arguments that since qualifying §546(e) intermediaries (such as clearinghouses) are nearly always "mere conduits"—who cannot be either transferor or transferee of a challenged transfer—it makes no sense for the safe harbor to apply only in cases where a §546(e) intermediary *is, in fact,* a transferor or transferee of the challenged transfer.

Petitioner and its supporting *amici* fail to grasp the purpose and function of a *safe harbor,* a failing also revealed by their emphatic reminders that the standards for whether an intermediary will be considered a "mere conduit" or a "transferee" were not fully developed when the safe harbor was enacted (and, indeed, are still highly indeterminate). *See* Brubaker, *supra,* at 6-7, 11-12. That is true and precisely the reason why a safe harbor was necessary (as demonstrated by the *Seligson* case, involving a clearinghouse defendant). The function of the safe harbor is *not* to prevent avoidance only where a §546(e) intermediary *is, in fact,* determined to be a transferor or transferee of a challenged transfer *after* litigating "mere conduit" status; the safe harbor absolutely prevents avoidance of a transfer based on *an allegation* that a §546(e) intermediary was a transferor or transferee of the challenged transfer (such as the allegation in *Seligson*) *without* any litigation of "mere conduit" status. *See Kaiser Steel Corp. v. Charles Schwab & Co.,* 913 F.2d 846, 848 (10th Cir. 1990) (refusing to address the "mere conduit" issue because the appellant securities broker was protected from *alleged* "transferee" liability by the §546(e) safe harbor); *see also* Brubaker, *supra,* at 15-16.

Buyer made an avoidable "transfer *to*" Stock Seller (analogous to the trustee's allegation in this case).



In that case, neither of Congress' concerns regarding protection of the securities market is implicated. There is no reason for the securites safe harbor to protect that "transfer" from avoidance, and it does not. The "transfer" sought to be avoided is not alleged to have been "made by or to (or for the benefit of)" a protected intermediary. *See generally*, Roe & Tung, *supra*, at 590-92.

D. The Seventh Circuit's Interpretation of §546(e) is the Only Rational and Practical Reading that Conforms to the Statute's Plain Meaning and Congressional Intent.

The essence of the Seventh Circuit's holding in the decision below—and of the cases on which that holding principally relied, *In re Munford, Inc.*, 98 F.3d 604, 609-10 (11th Cir. 1996) and *In re Healthco Int'l, Inc.*, 195 B.R. 971, 981-83 (Bankr. D. Mass. 1996)—is that the applicability of the §546(e) securities safe harbor cannot be determined in the abstract, but rather, can only be determined by reference to the "transfer" sought to be avoided.

In contrast, some courts have interpreted the scope of the §546(e) safe harbor in ways that neither adhere to the express terms of the Code, nor promote the salutary policy objectives Congress sought to achieve. Instead, those decisions create the risk of substantial economic mischief. The flaws in those prior decisions confirm the need to read §546(e)'s scope phrase as referring to the "transfer" sought to be avoided.

1. Unlike the more discerning opinions in *Munford, Healthco* and the decision below, the Second, Third, Sixth, and Eighth Circuits have instead viewed the text of §546(e) in isolation, relying on an invocation of "plain" meaning, but without engaging the operative statutory language. *In re Enron Creditors Recovery Corp.*, 651 F.3d 329, 338-39 (2d Cir. 2011); *In re Quebecor World (USA), Inc.*, 719 F.3d 94, 98, 99-100 (2d Cir. 2013); *In re Resorts Int'l, Inc.*, 181 F.3d 505, 515-16 (3d Cir. 1999); *In re Plassein Int'l*

Corp., 590 F.3d 252, 257-58 (3d Cir. 2009); *In re QSI Holdings, Inc.*, 571 F.3d 545, 550-51 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 986-87 (8th Cir. 2009). Those decisions ultimately run counter to a common-sense reading of the statutory language and established canons of statutory construction.

As a result, those courts have construed the §546(e) safe harbor in an indefensible fashion, which is apparent in their inconsistent descriptions of the "transfer" at issue. For example, in *Quebecor World*, the Second Circuit acknowledged that "transfers" at issue (which the creditors' committee "sought to avoid and recover") were "certain payments *made by debtor* Quebecor World (USA) Inc. *to* the appellee noteholders" who were "*not* financial institutions." 719 F.3d at 96, 99 (emphasis added).[15] Nonetheless, the court simultaneously stated that "this was a *transfer made to* a financial institution," CIBC Mellon, the disbursing agent for the noteholders. *Id.* at 99. But as the court's prior inconsistent description of the "transfer" at issue indicated, the committee was not seeking to avoid any transfer "to"

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[15] *See also In re Quebecor World (USA) Inc.*, 453 B.R. 201, 204, 212 (Bankr. S.D.N.Y. 2011) ("It is undisputed that these substantial payments were *made by [debtor]* QWUSA *to* the Noteholders ... within the ninety day period" before bankruptcy, as required by Code §547(b), which "provides that the trustee of a bankruptcy estate may recover ... money or property *transferred by an insolvent debtor* in the ninety days preceding bankruptcy, where the *transfer* (1) was *made to* ... a creditor") (emphasis added), *aff'd*, 480 B.R. 468 (S.D.N.Y. 2012), *aff'd*, 719 F.3d 94 (2d Cir. 2013).

CIBC Mellon (and thus subject CIBC Mellon to avoidance liability) because the Committee acknowledged that "CIBC Mellon was merely a conduit." *Id.*[16]

By its inconsistent assumptions regarding the "transfer" at issue, then, the Second Circuit purported to apply §546(e) to shield from avoidance a "transfer" ("to" CIBC Mellon) that was *not* being challenged and that *no one* alleged had even been made. As one court aptly noted, "true conduits" like CIBC Mellon "may not be subject to an avoidance recovery at all, thus rendering a §546(e) exception unnecessary." *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 676-77 n.31 (D.R.I. 1998). And, of course, the effect of the Second Circuit's confusion over the "transfer" at issue is pernicious because it obliquely extends the safe harbor of §546(e) to a "transfer" (*not* made "to" a financial institution) that the statute, by its explicit terms, does *not* protect.[17]

2. There is no merit to the efforts of petitioner and its supporting *amici* to bolster the Second (and other) Circuits' interpretation of the "transfer made

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[16] The bankruptcy court in that case made a similar self-contradictory assertion: "In determining that *the transfer in question* [*see* n.15, *supra*] qualifies for the [§546(e)] exemption, the Court must find that [it] has been *made to* a 'financial institution' .... [W]ithout question the Disputed Transfer was 'made ... to ... a ... financial institution,' *i.e.*, CIBC Mellon as trustee for the Notes." 453 B.R. at 212 (emphasis added).

[17] Other courts adopting the same "plain"-meaning interpretation of §546(e) exhibit the same vacillation regarding the "transfer" at issue. *See* Brubaker, *supra*, at 10 & n.78. And so does petitioner in this case. *See* n.7, *supra*, and accompanying text.

by or to (or for the benefit of)" scope language of §546(e). The argument they advance makes no sense.

For, example, petitioner's principal textual argument (echoed by petitioner's *amici*) is that interpreting "by or to (or for the benefit of)" in accordance with the "transfer"-correlative meanings those words carry throughout the Code's avoidance provisions would introduce surplusage into that phrase, supposedly rendering the "or for the benefit of" language (added in 2006) a superfluous amendment with no independent meaning or purpose. That argument is incorrect.

Under the natural "transfer"-correlative reading of the determinative scope phrase, the securities safe harbor applies when the "transfer" sought to be avoided allegedly (1) was "made by" a debtor-transferor who was a qualifying intermediary, "or" (2) was made "to" a protected intermediary as "transferee," "or" (3) was made to a transferee that was *not* a protected intermediary, but was nonetheless made "for the benefit of" a protected intermediary (*e.g.*, because the intermediary had contingent guaranty liability in conjunction with the transfer). Under the established, accepted meaning of transfer "for the benefit of" liability, "the categories 'transferee' and 'entity for whose benefit such transfer was made' are mutually exclusive." *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 896 (7th Cir. 1988). Thus, by definition, the "transfer"-correlative interpretation of §546(e)'s determinative scope phrase gives independent meaning, content, and applicability to each of the disjunctive prepositions within the

compound prepositional phrase "by or to (or for the benefit of)."

In truth, it is petitioner's proposed interpretation that would inject inexplicable surplusage into §546(e)'s determinative scope phrase. Petitioner's surplusage argument depends on petitioner's highly implausible assumption (*see* n.12, *supra*) that the phrase "for the benefit of" in §546(e) does not have the established meaning that phrase carries throughout the rest of the Code's avoidance provisions (and has carried for more than 100 years). Rather, petitioner assumes (without explication) that §546(e) uses the phrase "for the benefit of" to refer to cases where a qualifying intermediary is alleged to be the *transferor or transferee* of a challenged transfer.[18] If that were true, so the argument goes, then by reading the "by or to" phrase to *also* be referring to cases where a qualifying intermediary is alleged to be the *transferor or transferee* of a challenged transfer (per the "transfer"-correlative interpretation of "by or to"), redundant surplusage would exist.

Of course, if petitioner's foundational assumption regarding the meaning of §546(e)'s "for the benefit of" phrase is incorrect, petitioner's surplusage argument collapses. Even more damning, if one were to accept petitioner's implausible reading of the "for the benefit

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[18] At times, petitioner seems to take the position that this "for the benefit of" phrase refers to cases where a §546(e) intermediary is alleged to be the *transferee* of the challenged transfer. Petitioner's interpretation is equally problematic whether "for the benefit of" is assumed to refer only to a §546(e) intermediary as alleged transferee or also as alleged transferor.

of" phrase, it would introduce precisely the surplusage that petitioner decries.

Petitioner's proposed interpretation can avoid redundant surplusage *only if* the phrase "by or to" is *not* referring to cases where a qualifying intermediary is alleged to be the transferor or transferee of a challenged transfer; *viz.*, "by or to" refers *only* to cases like this one, where everyone concedes that qualifying intermediaries were involved as "mere conduits." That, of course, places petitioner in the untenable position of arguing that the phrase "transfer made by or to" is *not* referring to the *transferor or transferee* of that transfer; *i.e.*, a "transfer" is *not* made "by" the transferor and is *not* made "to" the transferee of that transfer. That argument is incompatible with petitioner's claim to be reading the text according to its plain, ordinary meaning, so petitioner never makes that aspect of its surplusage argument explicit. Petitioner's supporting *amici*, however, acknowledge that the phrase "transfer made by or to" includes within its scope the transferor and transferee of that "transfer."[19] If that is true, which it surely is, then reading the phrase "for the benefit of" as referring to the *transferor or transferee* of a challenged transfer (per the interpretation posit-

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[19] Brief for Various Former Tribune and Lyondell Shareholders as *Amici Curiae* in Support of Petitioner, at 12. *See also Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 848 (10th Cir. 1990), *aff'g* 110 B.R. 514, 516 (D. Colo.) (holding that "even if [the appellant broker] can be considered an initial transferee, [it] is ... nevertheless protected [from avoidance liability] by [Code] §546(e), which exempts 'settlement payments' made *to* brokers from recovery as a [constructively] fraudulent conveyance" (emphasis added)).

ed by petitioner and its *amici*) creates redundant surplusage between the phrases "by or to" and "for the benefit of."

Petitioner's proposed interpretation of the determinative "transfer made by or to (or for the benefit of)" scope phrase of §546(e) is contrary to the accepted meaning of that language throughout the Code's avoidance provisions. For altogether valid and compelling reasons, therefore, the Seventh Circuit in the decision below rejected the statutory construction proffered by petitioner. Pet. App. 13. This Court should also reject that interpretation, which conflicts with the express language, structural context, and congressional objectives of §546(e). A decision that correctly recognizes that the "transfer" sought to be avoided is the analytical transaction unit will chart the proper path for implementing §546(e) as its language requires and as Congress intended.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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